United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1258

To be argued by
RICHARD D. WEINBERG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1258

UNITED STATES OF AMERICA,
Appellee,

—v.—

MAURICE ALEXANDER ADAMS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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TABLE OF CONTENTS

TABLE OF CASES

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Preliminary Statement

Maurice Alexander Adams appeals from a judgment of conviction entered on June 24, 1975, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Henry F. Werker, United States District Judge, and a jury.

Indictment 74 Cr. 1032, filed on October 30, 1974 charged the defendant in one count with making a false statement in an application for a passport in violation of Title 18, United States Code, Section 1542.

Trial of Indictment 74 Cr. 1022 began on May 27, 1975 and ended on May 28, 1975 when the jury returned a guilty verdict. On June 24, 1975 Judge Werker sentenced Adams to three years imprisonment under 18 U.S.C. § 4208(a)(2) with a recommendation that upon completion of the sentence Adams be deported (Tr. 185).*

* Tr. refers to the trial transcript, and GX to Government Exhibit.

Statement of Facts

The Government's Case

On April 8, 1969 the defendant completed a passport application (GX 1), which he then presented to Arthurine Mitchell, a passport examiner in Manhattan (Tr. 22-24). On the application, defendant had written that he had been born on May 1, 1940 in St. Croix, Virgin Islands (GX 1). The defendant showed Mitchell a Virgin Island birth certificate as proof of citizenship (Tr. 24). Mitchell reviewed the application adding certain information in her own handwriting (Tr. 24). She crossed out the words "St. Croix" and added "of the U.S." following the words "Virgin Islands" (Tr. 31). Mitchell testified that she did this "because that is the way we write that in the passport" (Tr. 31). She also compared the applicant's photographs with the applicant, requested identification, had the applicant sign the photographs, and then compared the signature on the photographs with the signature on the identification (Tr. 24-25).

After completing these steps, Mitchell asked the defendant "Do you swear all the statements on the application are true to the best of your knowledge and belief and do you swear your allegience to the United States" (Tr. 25). The applicant responded affirmatively and then signed the application. Mitchell thereupon signed her name to the application, thus approving the application for a passport (Tr. 25).* As a result of Mitchell's ap-

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* Since Mitchell reviewed approximately 150 applications each day in 1969, she was unable to remember specifically reviewing this defendant's application (Tr. 20). She was able to testify to the standard procedure she followed whenever an individual presented her with a passport application (Tr. 20-21). Moreover, she was able specifically to identify Government Exhibit # 1, the defendant's passport application, as an application she had reviewed and approved because her handwriting and signature appeared thereon (Tr. 22-23).

proval of Adams' passport application, the latter was later issued a United States passport (Tr. 26; GX 2).

After receiving the passport the defendant traveled to a number of foreign countries, eventually arrived in Germany (GX 2). While in Hamburg, Germany, the defendant visited the United States Consulate on March 26, 1974 and again applied for a United States passport (Tr. 38-39; GX 7). This time the application was not approved (Tr. 39).

The German authorities thereafter refused to permit Adams to remain in Germany (Tr. 47). The United States government was opposed to his returning to the United States because he was not an American citizen (Tr. 52).*

Despite the United States' reluctance to accept him, on October 19, 1974 the defendant was returned from Germany to the United States. Upon his arrival at John F. Kennedy Airport he was arrested by Deputy United States Marshals (Tr. 86-88). The defendant was informed of his constitutional rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1964) (Tr. 88). Adams repeatedly told the deputy marshals that he was not a United States citizen (Tr. 88-91).

At the time of his arrest the defendant also turned over a passport from the World Service Authority which contained his photograph. The passport was issued to a Dominique Andre Allison born on May 1, 1940 in the Ivory Coast (Tr. 89; GX 9). Upon surrendering the passport, the defendant stated: "I am not a citizen of

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* While in Germany the defendant wrote to the American Consulate in Hamburg. He stated that "I am not of American nationality or origin" and "the birth certificate has been destroyed" (Tr. 39; GX 8).

this country. I am from West Africa, the Ivory Coast" (Tr. 89).

On the morning of October 21, 1974, the defendant was transported from Federal Detention Headquarters at West Street to the cell block of the United States Courthouse so that he could be arraigned that morning on the indictment herein. While awaiting arraignment, a deputy marshal asked the defendant to leave the cell block, and to walk over to the print room. Once there, the deputy marshall asked the defendant to lower his pants (Tr. 93). The deputy marshal saw a small tatoo on the defendant's left thigh (Tr. 91). The marshal testified that this was done as a further means of identifying the defendant. The marshal had a document indicating that the person whom the government believed Adams was should have an identifying mark on his left thigh (Tr. 96).*

The Government offered a number of documents establishing that the defendant was born in Guyana and not St. Croix, Virgin Islands.** A certified document from the deputy local register, Fredericksted District, St. Croix, Virgin Islands was received stating that the files of Ingeborg Nesbitt Clinic had been examined and no record was found of a David Alexander Adams (Tr. 36; GX 3). A certified document from the statistical clerk, Christiansted District, St. Croix, Virgin Islands was

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* Government Exhibit 5 was a fingerprint card containing the fingerprints of a Maurice Skeffers taken in 1960 in Guyana. The card had the further notation that this Maurice Skeffers had a tatoo on his left thigh.

** While St. Croix, Virgin Islands is part of the United States for purposes of citizenship and the right to receive a passport, Guyana is not (Tr. 25-26).

received, stating that the files of Charles Harwood Memorial Hospital for 1939, 1940 and 1941 had been checked and no record had been found for a David Alexander Adams born in the District of Christiansted, St. Croix (Tr. 36; GX 4).

Edith Leerdam, who is in charge of the vital records for the Virgin Islands, testified that there are two governmental districts in St. Croix—Fredericksted and Christiansted (Tr. 55). She further testified that someone not born in a hospital in 1940, but who had obtained a Virgin Island birth certificate by showing he had been born in the Virgin Islands, would have a birth record at either Ingeborg Nesbitt Clinic or Charles Harwood Memorial Hospital (Tr. 55-57). She further explained how records were maintained of people born in 1940 in hospitals located on St. Croix (Tr. 55).*

Government Exhibits 5 and 6 were also received into evidence (Tr. 36-37). Exhibit 6 was a certified copy from Guyana of a birth certificate for a Maurice Alexander born on May 1, 1940 to a Geralda Adams in Georgetown, Guyana. The name of the person present at birth was listed as a Donald Skeffers. Government Exhibit 5 ** was a fingerprint card containing fingerprints taken in Guyana in 1960 from a Maurice Skeffers, who had been born on May 1, 1940 in Georgetown, Guyana.

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* Mrs. Leerdam testified on cross-examination that in 1940 about 90% of the births on St. Croix occurred in a hospital (Tr. 60).

** Because the original fingerprint card had references to arrests, a xerox copy of the card was initially received (Tr. 36; GX 5). This card was redacted to eliminate any references to police or arrests. Defense counsel consented to this procedure (Tr. 6). The fingerprint expert, however, had made his comparison based on the original card (GX 5a), and defendant eventually offered the original fingerprint card into evidence (Tr. 121).

These fingerprints were compared by a fingerprint expert with the known fingerprints of the defendant (GX 11). The expert concluded that the fingerprints belonged to the same person (Tr. 73, 77; GX 5a, 11).

The Defense Case

The defendant presented no witnesses.

ARGUMENT

POINT I

Defendant's contention that the Government failed to prove that he made a false statement is utterly without merit.

Defendant argues that the government failed to prove that he in fact made the particular false statement on the passport application charged to him in the indictment. This is so, defendant contends, because before he signed the application Arthurine Mitchell, the passport examiner, crossed out St. Croix and added "of the United States" after "Virgin Islands", thereby assertedly converting defendant's statement that he was born in St. Croix, Virgin Islands to the statement that he was born in the Virgin Islands of the United States—a statement assertedly different from that charged in the indictment. Thus, the defendant argues, the Government proved at most only that he "attempted" to make the false statement charged in the indictment but was prevented from doing so by the passport examiner. Defendant's contentions, however, find no support either in law or semantics.

Preliminarily, it should be noted that, defendant's statement on the passport application, in both its original

form and as modified by the examiner, was shown by the evidence to be entirely false. The Government proved not only that defendant had not been born in St. Croix, but also that he had not been born on any of the other islands in the Virgin Islands of the United States.

The evidence clearly established, rather, that the defendant had been born in Guyana. The Government offered as evidence a birth certificate of a Maurice Alexander born to a Geralda Adams on May 1, 1940 in Georgetown, Guyana. The defendant claimed on the passport application that he was born in St. Croix on May 1, 1940, and that his name was David Alexander Adams. A fingerprint card from Guyana containing fingerprints taken from a Maurice Skeffers on February 10, 1960 was compared with the fingerprints of the defendant. The fingerprint expert concluded that the fingerprints were taken from the same person—the defendant.* The jury could have fairly concluded that the defendant was born in Guyana, and not St. Croix, Virgin Islands or any of the other islands comprising the Virgin Islands of the United States.

Moreover, defendant's legal position is erroneous. Without citing a single authority, he contends that the statement written by the defendant and submitted to the passport examiner is not a "statement" within the meaning of 18 U.S.C. § 1542. As a practical matter that position makes no sense. If the English language has any meaning, then the written application handed to the passport examiner containing the birth place of the appli-

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* The fingerprint card of Maurice Skeffers from Guyana states that Skeffers was born on May 1, 1940 in Georgetown, Guyana. The birth certificate for Maurice Alexander lists the district of birth as Georgetown, and the person present at birth as Donald Skeffers.

cant is most certainly the applicant's "statement", and the indictment so charged. The fact that the examiner modified the statement so as to conform to the internal procedures of the passport office has no significance. Adams' statement, in both its forms, continued to assert the material fact of his birth in the Virgin Islands of the United States; and the passport examiner relied on Adams' representation that he was born in St. Croix in determining that Adams was entitled to the privilege of holding a United States passport.

While we have found no cases directly on point, we believe a useful analogy can be drawn to precedent in prosecutions brought under 18 U.S.C. § 1001. In relevant part that statute makes it a crime knowingly to make a "false, fictitious or fraudulent stataement(s) or representation(s)," or to "make(s) or use(s) any false writing or document . . . in any matter within the jurisdiction of any department or agency of the United States." The provisions of the statute forming the basis for the instant indictment and conviction are essentially the same as those contained in 18 U.S.C. § 1001, except the former apply specifically to passport applications.

The law in this circuit is clear that the actual submission of the false statement to a department or agency of the United States is not necessary to convict under 18 U.S.C. § 1001. In *United States* v. *Candella*, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) defendants moved commercial tenants who were evicted under a federal urban renewal program. Under regulations of the Federal Department of Housing and Urban Development (HUD), the City of New York was to pay the movers, and the city would be reimbursed by HUD. Claims in excess of $10,000 had to be approved by HUD; claims less than $10,000 were paid for by New York City without such approval. The defendants argued that

they did not violate 18 U.S.C. § 1001 because the affidavits and bills of lading relating to moving expenses involved $3300 and were not submitted to HUD. Therefore, defendants argued, their statements (affidavits and bills of lading) were not a matter within the jurisdiction of HUD. Judge Mulligan writing for a unanimous panel rejected that contention:

> Case law makes it clear, however, that a violation of § 1001 does not require that the false statement must actually have been submitted to a department or agency of the United States, but rather that it was contemplated that the statement was to be utilized in a matter which was within the jurisdiction of such department or agency.

487 F.2d at 1227. See also *United States* v. *Krause*, 507 F.2d 113, 117 (5th Cir. 1975); *United States* v. *Kraude*, 467 F.2d 37, 38 (9th Cir.), *cert. denied*, 409 U.S. 1076 (1973); *United States* v. *Greenberg*, 268 F.2d 120, 122 (2d Cir. 1959); *United States* v. *Ebeling*, 248 F.2d 429 (8th Cir.), *cert. denied*, 355 U.S. 907 (1957).

Undoubtedly the defendant "contemplated", in the language of *United States* v. *Candella*, that his statement relating to his place of birth would be utilized by the Passport Authority in order to decide if he should receive a passport. If criminal liability under 18 U.S.C. § 1001 can be based on a defendant's statement which is not actually submitted to the relevant federal agency, then obviously one violates 18 U.S.C. § 1542 when he actually submits a false statement to an employee of the Passport Authority. The entire statutory purpose underlying 18 U.S.C. § 1542 would be vitiated if the Court were to hold that the passport applicant's "statement" was something other than what he initially submits to the passport examiner.

In any event, the defendant's claim that the false statement charged to him in the indictment is different than that proved at trial to have been made by him to the Passport Authority is no more than a hypertechnical claim of variance between the pleading and proof. Such a claim is unavailing where, as here, the material element of the statement in both its forms was precisely the same, and the defendant has failed even to allege any prejudice.

POINT II

The examination of defendant for an identifying tatoo while he was a prisoner did not violate his Fourth Amendment rights.

Defendant contends that the trial court erred in refusing to instruct the jury to disregard the testimony of a deputy marshal relating to the presence of a tatoo on defendant's thigh. He asserts that the marshal's conduct in having the defendant lower his pants at the marshal's request after the defendant had been brought from federal detention facilities to the courthouse cell block to await arraignment was an unreasonable search within the meaning of the Fourth Amendment. This argument is without merit.

The defendant was asked to lower his pants on the morning of October 21, 1974 after he had been brought to the courthouse. The defendant had been arrested Saturday evening, October 19, 1974 at approximately 9:00 P.M. at John F. Kennedy Airport (Tr. 86). After the arrest he was incarcerated at the Federal Detention Headquarters (Tr. 90), where he apparently remained until October 21, 1974 when in accordance with relevant law he was brought to the courthouse to be arraigned. The marshal's conduct in asking the defendant to lower

his pants does not fall within "the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968).

While of course a lawfully incarcerated prisoner is "not wholly stripped of constitutional protections", *Wolff* v. *McDonnell*, 418 U.S. 539, 555 (1974), he does suffer certain limitations on his rights and privileges. See *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). He obviously does not enjoy the same Fourth Amendment protections of a citizen who is not incarcerated. Thus, prison authorities in the inmate's presence may open a prisoner's mail even from a prisoner's lawyer to insure that there is no contraband in the envelope. Such a procedure does not run afoul of the constitution. *Wolff* v. *McDonnell*, *supra*. In addition, as defendant practically concedes (Brief at 9), a prisoner can be subjected to a warrantless strip search for weapons.

If the deputy marshal could have properly conducted a full scale strip search of the defendant for weapons, then the considerably less intrusive eye search of the defendant for identifying marks must be proper. The Supreme Court has clearly held that the searching officer's subjective intent for conducting a search is of no moment if the circumstances warranting the search exist. *United States* v. *Robinson*, 414 U.S. 218, 235-236 (1973); *Gustafson* v. *Florida*, 414 U.S. 260, 266 (1973). A full search of a citizen incident to an arrest is proper regardless of whether the searching officer believes the citizen is armed, so long as the condition justifying the search—a lawful arrest—exists.* Similarly, so long as Adams

* The court in *Gustafson* v. *Florida*, *supra*, 414 U.S. at 266 observed: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Smith (the searching officer) did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed."

was lawfully in the custody of the marshal and could be stripped and searched for weapons, the fact that a less intrusive* search was conducted for another purpose is of no constitutional consequence.

Moreover, the government can obtain identifying information from a person who has been arrested without violating that individual's constitutional rights. In *Davis* v. *Mississippi*, 394 U.S. 721 (1969) the Court held that a defendant's fingerprints obtained after police detention following a wholesale roundup of defendant and twenty others was unconstitutional. But as the Court made clear in *United States* v. *Dionisio*, 410 U.S. 1, 11 (1973), the problem in *Davis* was that the initial seizure of the defendant was unlawful; the taking of fingerprints did not violate constitutional protections. Indeed the Court in *Dionisio* stated that in *Davis* "we left open the question whether, consistently with the Fourth and Fourteenth Amendments, narrowly circumscribed procedures might be developed for obtaining fingerprints from people when there was no probable cause to arrest them." *United States* v. *Dionisio*, *supra* at 11.**

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* It is a far greater intrusion into a prisoner's privacy to require him to strip completely, and then submit to a search, than it is to ask the prisoner to lower his pants so that a marshal can look for an identifying tatoo.

** This Court recently stated in *United States ex rel. Hines* v. *LaVallee*, — F.2d —, Dkt. No. 75-2039 (August 13, 1975), slip op. 5601, 5607:

> "Indeed, a suspect who refuses to furnish his name or address may be ordered by the Court to furnish information that will facilitate his identification, such as fingerprints, see *Boneparte* v. *Smith*, 362 F. Supp. 1315, 1318-19 (S.D. Ga.), *aff'd*, 484 F.2d 956 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974), photographs, see *Gilbert* v. *United States*, 366 F.2d 923, 932-33 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967), handwriting exemplars, see *Gilbert* v. *California*, 388 U.S. 263, 266-67 (1967), blood samples, see *Schmerber* v. *California*, 384 U.S. 757, 761 (1966), or similar identifying data, and to participate in a properly constituted line-up with the aid of counsel, see *United States* v. *Wade*, 388 U.S. 218, 221-22 (1967)."

In the instant case the defendant was lawfully arrested. Defendant does not even intimate to the contrary. He, therefore, could properly have been asked to submit to certain examinations for purposes of identification. The deputy marshals could have taken his fingerprints. Similarly they could have searched for other identifying marks such as a tatoo. Here the deputy marshal had information that the true identity of the defendant was that of an individual from Guyana who had a tatoo on his left thigh. To verify that information the marshal took the reasonable step of asking to see the defendant's thigh where the document from Guyana indicated the identifying mark would appear.

There is still a third ground upon which the search of the defendant can be justified. Since the marshals could have lawfully conducted a full custodial search incident to the arrest, see *United States* v. *Robinson, supra*, they could lawfully conduct that search approximately thirty-six hours later at the cell block in the courthouse. *United States* v. *Edwards*, 415 U.S. 800 (1974); *United States* v. *Maslanka*, 501 F.2d 208 (5th Cir. 1974), *cert. denied*, — U.S. — (1975); *United States ex rel. Muhammed* v. *Mancusi*, 432 F.2d 1046 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971); *United States* v. *Caruso*, 358 F.2d 184 (2d Cir.), *cert. denied*, 385 U.S. 862 (1966). The request that defendant pull down his pants does not become an unlawful search simply because the marshals did not have the defendant strip "to the buff" at the airport. *United States* v. *Caruso*, *supra*, at 185-186. Nor can defendant claim this custodial search incident to incarceration "violate(s) the dictates of reason either because of (its) number or manner of perpetration." *United States* v. *Edwards*, *supra*, 415 U.S. at 808, n. 9.

In *United States* v. *Edwards*, *supra*, the defendant was arrested and incarcerated late in the evening. Contemporaneously or shortly thereafter an investigation at the scene of the crime revealed paint chips on the window sill of the window the robber attempted to pry open. The next morning the defendant's clothes were removed from him in order to examine them for paint chips. The Court held that the approximate delay of ten hours from the time of arrest to the time of the search and seizure did not vitiate the validity of the warrantless search. While the delay from the time of arrest until the search was clearly longer in the instant case, the rationale of *Edwards* still applies. Justice White's opinion applies to the facts of the deputy marshal's examination of Adams:

> This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more on June 1 than they were entitled to do incident to the usual custodial arrest and incarceration. *United States* v. *Edwards*, *supra*, 415 U.S. at 805.*

Finally, in light of the overwhelming evidence of defendant's guilt, even if the action of the deputy marshal

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* In addition the Court's opinion in *Edwards* notes that there is nothing unreasonable about the police examining and holding personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest. *United States* v. *Edwards*, *supra*, 415 U.S. at 806. Adams, who had been lawfully arrested on the evening of October 19, was still in lawful custody of the United States Marshal on October 21 when the examination of his thigh occurred.

constituted a violation of defendant's Fourth Amendment rights any error was undoubtedly harmless. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223 (1973); *Harrington* v. *California*, 395 U.S. 250 (1969); *United States* v. *Williams*, Dkt. No. 75-1206 (2d Cir., Sept. 26, 1975); *United States* v. *Chasen*, 451 F.2d 301, 305 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972): Rule 52(a), Federal Rules of Criminal Procedure. The Government's evidence independent of the tatoo identification was more than sufficient to prove that the defendant was born in Guyana and not the Virgin Islands. Most notably the jury could properly have considered the birth certificate of a Maurice Alexander born on May 1, 1940 in Georgetown, Guyana to a Geralda Adams, the testimony of the fingerprint expert comparing defendant's fingerprints with those of a Maurice Skeffers taken in Guyana in 1960, and the search of birth records in St. Croix, Virgin Islands.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Richard Weinberg being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21 day of October 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

David Keegan, Esq.
McCoyd & Keegan
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Garden City, New York

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Richard D Weinberg

Sworn to before me this
2nd day of October, 1975
Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541375
Qualified in Kings County
Commission Expires March 30, 1977